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PRIVATE ANTITRUST ACTIONS FOR REFUSAL TO DEAL

GEORGE J. ALEXANDER*

Refusal to deal with non-complying customers has long been a weapon in the arsenal of manufacturers bent on establishing schemes which could not be bilaterally created because of the antitrust laws.[1] Actually the weapon is greatly overrated, as many who were still optimistic about the device found out with the decision of the *Parke-Davis* case.[2] Some believe, in fact, that it is entirely a dud.[3] At any rate, the countermeasures have grown with recent decisions. *Parke-Davis* was merely a reassertion of the implications of much earlier cases[4] that the government could attack a scheme although it was technically established through procedure which was more unilateral than bilateral. A newer threat lies in the potential of a suit by the customer punished for refusal to comply. This article will

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1. United States v. Colgate & Co., 250 U.S. 300 (1919) has been generally interpreted as sanctioning the action of a single trader, who is not a monopolist, in demanding customer adherence to a scheme which would violate the antitrust laws if accomplished by contractual agreement. The distinction between legal and illegal demands turns on the ability of the single trader to have his demands characterized as unilaterally imposed rather than having the resultant conformity characterized as the product of agreement, since the applicable statutes interdict conduct only when it rises to at least a bilateral level.

2. United States v. Parke, Davis & Co., 362 U.S. 29 (1960). In a civil suit instituted by the government, Parke-Davis was charged with violation of § 1 of the Sherman Act. As part of a price-maintenance scheme, P-D had allegedly: 1) discontinued sales to retailers which did not maintain prices, reinstituting dealings when the retailers satisfied it that the prices would be maintained; 2) instructed wholesalers, on pain of loss of their supplies, not to deal with retailers which were cutting prices; 3) obtained verbal assurance of future compliance with the pricing policy from at least one retailer; and 4) assured retailers that compliance with the pricing policy would be required of their competitors as well as of them. The Supreme Court held the facts to be sufficient to require a judgment for the government. Without challenging the right of a single trader to announce a price to be maintained and threaten to deal with non-conformers, the Court found the enumerated acts to be tantamount to a combination or conspiracy thus supplying the duality required for a section 1 verdict. Summarizing its review of previous cases, the Court stated: "When the manufacturer's actions . . . go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices, . . . he has put together a combination in violation of the Sherman Act." *Id.* at 44.

3. Mr. Justice Harlan, dissenting to Parke-Davis, *Ibid.*, suggests that the opinion has sent the right to refuse to deal as a means of establishing an otherwise unlawful scheme to its demise.

4. FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922); United States v. Bausch and Lomb Optical Co., 321 U.S. 707 (1944).

survey recent cases dealing with private actions brought by such customers.

A few years ago the chances of success of a dealer bringing a private action because of unilateral refusal to deal with him were minimal unless he could connect the refusal with a scheme of monopolization.[5] The two most common reasons given by the courts for holding against private plaintiffs were: 1) the lack of duality required under the applicable act[6] and 2) the lack of public injury.[7] Recent cases do not lend themselves to such simple synthesis.

Some courts, such as the court in *Tobman v. Cottage Woodcraft Shop*,[8] appear to decide such cases in much the same way as they were decided in the past. The complaint, in that case, alleged that: the defendants, a manufacturer of patio furniture, the manufacturer's local agent and a retail competitor of the plaintiff, were involved in price fixing. The manufacturer had allegedly accepted the retail price determined by his agent and the defendant retailer and had made this the "suggested retail price" for his products. Both manufacturer and selling agent had then, according to the complaint, demanded compliance with the price set and policed such compliance by sending shoppers to stores suspected of discounting. When discovered selling below the suggested price, plaintiff had been cut off from further sales.

Dismissing the complaint, the District Court ruled that the actions complained of did not affect interstate commerce and that there was no allegation of public injury. Furthermore, the court pointed out, while the agreement between the manufacturer's agent

5. A scheme of monopolization makes section 2 of the Sherman Act applicable. Consequently, duality of action is not required and the supplier's conduct is sufficient to establish plaintiff's case. Eastman Kodak v. Southern Photo Materials Co., 273 U.S. 359 (1927). Plaintiffs relying on unilateral refusal to deal for failure to maintain prices have, until recently, failed. See Handler, *Annual Review of Antitrust Developments,* 15 RECORD OF N.Y.C.B.A. 362, 367 (1960) and cases cited. Plaintiffs relying on unilateral refusal to deal for reasons other than price maintenance have fared no better. See Barber, *Refusal to Deal Under the Federal Antitrust Laws,* 103 U. PA. L. REV. 847, 860 (1955) and cases cited.

6. The duality requirement may defeat the plaintiff's action in two ways. It may be found that the entire distribution policy of the supplier is unilateral and, hence, unobjectionable. *E.g.,* Leo J. Meyberg v. Eureka Williams Corp., 215 F.2d 100 (9th Cir. 1954), *cert. denied,* 348 U.S. 875 (1954). Alternatively, it may be found that, while a multilateral distributive scheme may exist, the supplier's dealings with the plaintiff were unilateral and, hence, unobjectionable. *E.g.,* Nelson Radio and Supply Co. v. Motorola, Inc., 200 F.2d 911 (5th Cir. 1952), *cert. denied,* 345 U.S. 925 (1953).

7. *E.g.,* Hudson Sales Corp. v. Waldrip, 211 F.2d 268 (5th Cir. 1954), *cert. denied,* 348 U.S. 821 (1954).

8. 194 F. Supp. 83 (S.D. Cal. 1961).

and the retailer setting the "suggested" price, if proven, would establish the requisite duality of action, the later enforcement of that price by the manufacturer and his agent was perfectly proper as a unilateral refusal to deal.

Of present interest are the court's conclusions relating to the necessity of public injury and the finding of lawful unilateral action in the statement of retail price coupled with the enforcement program. The public injury holding, which the opinion traces through an impressive list of cases, is somewhat peculiar in that no mention is made of either of the two most recent Supreme Court cases in point. In *Klors Inc. v. Broadway-Hale,*[9] one of the two unmentioned cases, the Court found illegality under the antitrust laws to be synonymous with the "public injury" requirement for private actions, at least in those cases which demonstrated a tendency toward monopoly. The second unmentioned case, *Radiant Burners Inc. v. Peoples Gas, Light & Coke Co.,*[10] appears to settle the "public injury" requirement more definitely. In a *per curiam* opinion, the Court dealt with the requisite burden of proof in a private action brought under section 1 of the Sherman Act and concluded:

> By § 1, Congress has made illegal: 'Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . .' Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, . . . Congress having thus prescribed the criteria of the prohibitions, the courts may not expand them. Therefore, to state a claim upon which relief can be granted under that section, allegations adequate to show a violotion and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires.[11]

Although the case was again one which dealt with a multipartite decision the effect of which might be similar to the *Klors* effect, the language of the opinion appears unqualified. It would seem that the "public injury" test has been read out of private antitrust suits by the Supreme Court only to be reintroduced by *Tobman.*

Analyzing the duality of action requirement, the court in *Tobman* quotes at length from the recent *Parke-Davis* case and concludes that that opinion allows refusals to deal so long as there is no combination between the parties. The fact that the price set was enforced by shoppers apparently was considered irrelevant, the court con-

9. 359 U.S. 207 (1959).
10. 364 U.S. 656 (1961).
11. *Id.* at 660.

cluding that as to the manufacturer's maintenance of price "there are no facts from which the existence of a contract, combination or conspiracy, can be inferred."[12]

In another case following the same approach,[13] a similar arrangement was presented not in a complaint but as a defense to an action for trademark infringement. The House of Dior brought suit against Alexander's Department Store for misuse of the name "Dior" in connection with the sale of a copy of the famous design house's styles. Among other allegations in the answer, the defendants claimed that the contracts made by Dior with merchants who were authorized to use the Dior styles and name violated the antitrust laws of the United States. Those contracts required that the customers, as a prerequisitie to using the Dior name at all, refrain from using the name on any copies which were to be retailed at less than one hundred dollars and that they require the same agreement of any customer-retailer to whom they might sell. Though the answer contained an allegation of a conspiracy by several of the customers and Dior to eliminate Alexander's as a competitor, this allegation was abandoned on argument and not considered by the court. Denying that the answers entitled defendant to summary judgment, the court stated:

> The refusal here to sell unless the required promise is given is a legitimate, though perhaps practically unenforceable device for creating in the mind of the purchasing public an association between Dior copies and good material, workmanship and service. If retailers are required to charge $100 in order to state that what they are selling is a Dior copy they will tend to give the quality of material, workmanship and service for which the public is willing to pay $100. The plan does not come within the interdiction of the recent United States v. Parke Davis & Co. against refusal to sell as a means of constructing a combination or conspiracy to fix resale prices.[14]

On the other hand, even before *Parke-Davis,* the Seventh Circuit took a different view of similar facts. In *A. C. Becken Co. v. Gemex Corp.,*[15] the plaintiff had been cut off from further supplies because

12. Tobman v. Cottage Woodcraft Shop, 194 F. Supp. 83, 87 (S.D. Cal. 1961).
13. Societe Comptoir De L'Industrie Cotonniere, Etablissements Boussac v. Alexander's Department Stores, Inc., 190 F. Supp. 594 (S.D. N.Y. 1961).
14. *Id.* at 600.
15. 272 F.2d 1 (7th Cir. 1959), *cert. denied,* 362 U.S. 962 (1960).

it refused defendant's demands to maintain the prices set by the defendant for his own products and the prices of defendant's competitor's brands. The defendant had elicited promises to maintain both his and his competitor's prices from other retailers who sold Gemex products in the plaintiff's vicinity and had shaken hands over it with them. Reversing the District Court's holding that the facts alleged did not state a claim for which relief could be granted, the Court of Appeals held that the right to refuse to deal was a limited right and, without detailing in what respects this arrangement had transgressed the limits of the right, found the conduct in question illegal and remanded the case to the District Court solely to ascertain damages.

Tobman,[16] *Alexander's*[17] and *Gemex*[18] all deal with a price-fixing scheme enforced through the seller's refusal to deal with price cutters. The facts of *Gemex,* however, are somewhat different from those of the other two cases. In *Gemex* the seller demanded not only adherence to his own prices, but also adherence to the prices of *his competitors.* While this distinction, once duality of action is granted, would hardly be necessary since price-fixing itself would be sufficient to establish a violation of Section 1 of the Sherman Act,[19] it is an aggravating factor to be considered in analyzing the allegedly unilateral nature of the action. If *Parke-Davis* stands for the proposition that combination may be implied from a scheme of price-fixing that departs from Doric simplicity, the inclusion of the whole line of products rather than only the one offered for sale ought to be a good starting point in finding lack of simplicity. Certainly a manufacturer could decide that his best interests are served by requiring adherence to the prices suggested for the whole line of competititive goods without combining or conspiring. If the retailer is not bound to adhere to the prices of other manufacturers and if the price suggested for his own product includes a wider margin of profit than it otherwise might (as must be assumed to be the usual case in instances where retailers balk at charging the price suggested) the net result of price fixing may be to divert the retailer's efforts to discounting competitor's goods with a consequent loss of sales to the manufacturer. Even this analysis, however, will only explain the actions of a seller in a market where both he and his competitors

16. *Supra* note 12.
17. *Supra* note 13.
18. A. C. Becken Co. v. Gemex Corp., 272 F.2d 1 (7th Cir. 1959); *cert. denied,* 362 U.S. 962 (1960).
19. United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

are selling at prices in excess of those that would be competitively established by the defecting sellers. Such a position, in turn, suggests a monopolistic condition in the market, which itself would taint the refusal to sell. To some extent, of course, the analysis of monopolistic position is equally applicable to a single seller's demand that his own product be sold at a given price.

Alternatively, if *Parke-Davis* suggests that a combination may be implied from a series of conferences with retailers, does not the additional element of the demand for price stability in the entire line of goods strengthen the inference that a multilateral scheme is being employed to shore up the price? Is it not less likely that a single seller, acting only through demands on his customers is able to manipulate not only his own price but its interrelationship with the prices of others?

While *Gemex* presents unique circumstances that might allow it to take its place beside the other price-maintenance cases, *George W. Warner Co., Inc. v. Black and Decker Manufacturing Company, Inc.*[20] meets the price-maintenance issue head on. In that case, plaintiff alleged that he was cut off from supplies after he refused to withdraw a bid he had made on a New York City Housing Authority contract. The bid price was below the price set by the defendant for his product and defendant had announced its policy of refusal to deal with anyone not maintaining its price. The District Court, finding that the complaint did not allege that the retailers had conspired among themselves or with Black and Decker to maintain the price, found the actions of the defendant to be unilateral and, hence, unimpeachable. The Court of Appeals reversed the District Court's decision, citing among other cases the *Parke-Davis* case which had been decided between the decision of the District Court and the conclusion of the appeal. It found that the complaint brought the case within the doctrines of *Beech-Nut*[21] and *Parke-Davis* sufficiently to allow trial though it did state, rather ambiguously:

> Of course, it will be necessary for plaintiff to sustain the allegations by the necessary proof because it would appear from the concurring opinion of Mr. Justice Stewart in the *Parke, Davis* case that the *Colgate* principles have not been completely destroyed. The Supreme Court has left a narrow channel through which a manufacturer may

20. 277 F.2d 787 (2d Cir. 1960).
21. FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922).

> pass even though the facts would have to be of such Doric simplicity as to be somewhat rare in this day of complex business enterprise. . . . The only question presently before the court is whether the amended complaint is sufficient for that purpose. A fair reading of the pleadings as a whole leads to the conclusion of such sufficiency . . .[22]

Since the plaintiff had alleged that the scheme complained of was the result of combination and conspiracy, it is not clear what proof the Court of Appeals would require. Defendant did not deny that he had used threats of refusal to deal as a means of price setting nor that plaintiff had been cut off from supplies because of his failure to follow the required price, so apparently neither of those facts would present considerable proof problems at trial. While the opinions do not state whether the plaintiff alleged that the other Black and Decker dealers did maintain the prices as demanded, it is a fair assumption from the facts given and, at any rate, would not be difficult to prove at trial. It is also reasonable to assume that the proof of a conspiracy between the manufacturer and dealers, or among dealers, need not show a conspiracy *expressly* aimed at excluding the plaintiff from the trade. Such conspiracy does not seem to be within the language of the complaint and finding for the plaintiff on such a reading of the complaint would not require deciphering the *Colgate*[23] - *Parke-Davis* line of cases which the opinion meticulously attempts. All that appears to remain is a requirement that plaintiff offer some proof that the price-maintenance scheme was achieved as the result of a concert of action rather than solely as the result of the statement of policy by the defendant. No indication is given as to the actual amount of proof required to allow a finding of *implied* conspiracy as was found in *Parke-Davis*.

Despite its lack of definition of the scope of its holding, *Black and Decker* seems more in line with the cases instituted by the government than does either *Tobman* or *Alexander's*. In *Tobman*, the policing policy seems reminiscent of the enforcement policy which was found so objectionable in *Beech-Nut*[24] and, for all that when the court decided the motion, it was aware that there might well

22. George W. Warner Co. v. Black and Decker Manufacturing Company, 277 F.2d 787, 790 (2nd Cir. 1960).
23. United States v. Colgate & Co., 250 U.S. 300 (1919).
24. FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922). The court distinguished the scheme in Beech-Nut from permissible refusal to deal primarily on the effectiveness of the Beech-Nut policing. Customers were required to participate in enforcement.

have been customer cooperation in *enforcement* as well.[25] Since conspiracy was alleged in both *Tobman* and *Alexander's,* it is difficult to understand why proof might not have brought the schemes within the interdiction of *Parke-Davis.* If *Radiant Burners*[26] has equated private and public actions in regard to the illegality required in each, *Black and Decker* would seem to correctly state the law.

Threat of refusal to deal has been used to accomplish aims other than price maintenance. One objective, sometimes accomplished by such threat, is tying. A seller may refuse to sell product A (the tying product) for which there is a good demand unless the buyer will also buy product B (the tied product) for which the demand may not be as great. While such conduct on an economically advanced level runs the risk of being upset by a suit by the government, until recently the non-complying dealer had little chance of recovery in a private suit against his supplier.

Once one disposes of the public injury concept, this is another area in which refusal to deal raises interesting problems in distinguishing between unilateral permissible conduct and bilateral conduct or conduct which is the equivalent of bilateral conduct. The duality of action in the tying case is, of course, likely to run between the manufacturer or wholesaler and the retailer. Unlike the pricing cases in which it is usually necessary to obtain the cooperation of a number of retailers, tying can be worked out on an individual basis. This distinction brings into sharp focus the need for analysis of the transactions between buyer and seller because reference to an implied conspiracy between the supplier and his other customers will not decide the difficult questions. Where the tying pattern is repetitive throughout the sales of a given product, however, and the manufacturer refuses to sell to anyone not following the pattern, the possibility of the conspiracy analysis of the resale price maintenance cases is renewed.

In *Osborn v. Sinclair,*[27] the Fourth Circuit was faced with an agreement which it analyzed solely in terms of the dealings between the two immediate parties. Sinclair, which had granted a lease to Osborn for a Sinclair filling station, brought pressure over a period of years on Osborn to buy greater quantities of tires, batteries and

25. One act of cooperation is alleged in the complaint. The "shopper" who discovered plaintiff's deviation was informed to investigate the matter by competing merchants.

26. Radiant Burners Inc. v. Peoples Gas, Light & Coke Co., 364 U.S. 656 (1961).

27. Osborn v. Sinclair Refining Co., 286 F.2d 832 (4th Cir. 1960), *cert. denied,* 81 S. Ct. 1924 (1961).

accessories through them. According to the complaint, the company's representatives finally threatened not to renew the lease unless greater purchases were made. To retain the lease for another year, Osborn complied. When the situation recurred, at the end of the next year, Osborn refused to comply and the lease was cancelled. Finding that the original compliance established an illegal tying agreement, the Court of Appeals reversed the District Court's dismissal of the complaint. A year earlier, the same court had affirmed the dismissal of a similar complaint that differed mainly in the fact that the supplier there threatened to cancel a dealership contract (under the provisions of the contract allowing short term cancellation) rather than refusing to renew an expired contract.[28]

The court analysis in *Osborn* does not depend on an implied conspiracy by the manufacturer and other retailers to sell the line of products in question although the facts might support such an analysis. The illegal duality found is the action between the defendant and the plaintiff: the signing of the new lease after plaintiff had succumbed to the demands to buy more TBA products. The approach leaves a number of questions unanswered. Little light is shed on the significance of formal lease negotiations as opposed to a mere statement by the manufacturer that there would be no further dealings unless more TBA products were bought. One wonders how much more is involved in such a transaction than surrender to a demand made on refusal to deal. The only measure of certainty that emerges is that it was necessary for the plaintiff to agree to the demands made upon him, for that apparently provided the requisite duality.

Going even more to the heart of dealership agreements is refusal to sell unless the dealer procures the manufacturer's supplies exclusively. It is, in fact, in such agreements express or implied that the concept of dealerships and area franchises thrives. Since exclusive dealing under circumstances evidencing a substantial adverse economic effect on interstate commerce also violates the antitrust laws, this is another area that has seen a shift in treatment given by the courts to buyers who do not wish to comply with the conditions imposed on their receipt of supplies.

In *Englander Motors, Inc. v. Ford Motor Co.*,[29] the Sixth Circuit

28. McElhenney Co. v. Western Auto Supply Co., 269 F.2d 332 (4th Cir. 1959). The author has commented on the distinction between the two cases. Alexander, *Full-Line Forcing of Less Than Requirements by Threat of Refusal to Deal — A Per Se Violation?*, 12 Syracuse L. Rev. 175 (1960).
29. 267 F.2d 11 (6th Cir. 1959).

reversed the District Court's dismissal of a complaint which alleged that the plaintiff had lost his dealership because of failure to comply with the demands of the defendant that he use Ford parts almost exclusively in conducting his authorized Ford repair facility as part of his general dealership in Ford cars. While the complaint in part alleged monopolization by the defendant, the court also upheld the section of the complaint which was based on the allegedly illegal requirement relating to parts. According to the court, if the condition requiring the use of Ford parts were proven at trial, all that would remain to make out a case would be proof that the arrangement had the effect of substantially lessening competition.

Englander, as opposed to *Osborn,* does not seem to lay great stress on initial compliance with the demands made by the manufacturer. It finds the condition one which would be illegal if made bilaterally and hence one which may not be imposed by threat of refusal to deal, finding the right to refuse to deal a very limited right.[30]

The cases commented on above are illustrative of current cases concerned with refusal to deal where that device is used to achieve a result which would be illegal if accomplished by the joint agreement of the parties involved. A few courts have gone further and have considered the right of a supplier to refuse to deal with a customer where such refusal is part of a scheme which would not be illegal if arrived at in concert with others.

In *Poller v. Columbia Broadcasting System, Inc.,*[31] the plaintiff complained that his affiliation with the Columbia Broadcasting System had been cancelled. According to the complaint, CBS was interested in obtaining a UHF television station in Milwaukee. After determining that the plaintiff's price for the UHF station which he was trying to sell was higher than it intended to pay, CBS, through an intermediary, took an option on the other UHF station in Milwaukee. It subsequently bought the other station and cancelled the plaintiff's network affiliation in order to assume that affiliation itself. Since the expensive equipment which plaintiff had bought while he was a network affiliate was not required in order to operate a purely local television station, he arranged a swap of equipment with the

30. The complaint alleged that plaintiff's franchise had been cancelled for non-compliance with a condition imposed by defendant by express or implied agreement with all customers. No mention was made of plaintiff's previous compliance. Though the opinion is not clear on this point, it appears to allow recovery if the results of the coercive practices of defendant brought about results which would be unreasonable if accomplished by agreement.

31. Poller v. Columbia Broadcasting System, Inc., 284 F.2d 599 (D.C. Cir. 1960).

defendant and was paid for the difference in value. Claiming intra-enterprise conspiracy and an attempt to monopolize, plaintiff sought damages. The District Court, on a motion for summary judgment, dismissed the complaint and the Court of Appeals affirmed, Judge Washington dissenting. He thought that the plaintiff ought to be allowed to prove, among other things, that the purchase was an illegal restraint of trade because it would discourage competition in the Milwaukee area or in other places. The rationale of that part of the dissent appears to be that a seller may restrain trade by taking over a distributive affiliate without the action necessarily being an act of monopolization.

While the dissenting opinion shows concern for a claimant who is certainly the victim of superior economic power in the hands of the defendant, it is a little difficult to make out a case of restraint of trade in a situation in which the number of suppliers and their relative positions in the market remain unchanged. The dissenting opinion concedes that there would have been no restraint of trade if the station franchise had been granted to someone else.[32] What makes it potentially restraining, according to the opinion, is that the radio network itself assumed control. This distinction, while quite appropriate if monopolization were in issue, is inappropriate to a Section 1 Sherman Act charge. More likely, the opinion should be taken as an assertion that the economic club of refusal to deal may not be used for grievances not connected with the adequacy of representation of the dealer's product in situations of such disparity of power.

In another interesting case, *P. W. Husserl Inc. v. Simplicity Pattern Co.*,[33] the plaintiffs complained that after they began suit against the defendant for other antitrust violations, he refused to deal with them further. The Court granted a preliminary injunction forbidding the defendants to refuse to deal with the plaintiffs. The court's rationale is summarized in one of the paragraphs of the opinion:

> In the case at bar the refusal to deal is a bold attempt on the part of the defendant Simplicity to deter litigants by economic coercion from pursuing the lawful remedies granted them by Congress under the anti-trust laws. Congress envisaged such private suitors as "allies of the government in enforcing the anti-trust laws". 51 Cong. Rec. 16319 (1914). To permit private suitors in that position to be coerced from pursuing the remedies which Congress

32. *Id.* at 608 n. 3 (dissenting opinion).
33. 191 F. Supp. 55 (S.D. N.Y. 1961).

> gave them would frustrate the public policy which motivated Congress to grant such remedies. It would permit violators of great economic strength to rest secure from remedial and punitive action by private litigants through the exercise of their economic power. Such a result cannot be tolerated by the courts if the policies enunciated by Congress are to be carried out.[34]

The case is currently being appealed. If the District Court is affirmed in its conclusion, the opinion will go further than any prior decision in limiting the right of refusal to deal as an economic weapon. From the facts of the case, it seems clear that to find an implied conspiracy by the nonsuing suppliers is rather nonsensical. If the non-suing suppliers had actionable claims and did not exercise them it was certainly not because they made the decision as a matter of self-interest akin to the self-interest which might motivate them to adopt a minimum pricing policy. Of even greater significance is the fact that even if the agreement in question were made part of the sales contracts and signed by the sellers, there would be no precedent for holding the dual conduct to be in restraint of trade. It may well be that a contract not to sue for damages under these circumstances would be unenforceable as against public policy but even the staunchest advocates of expansion of the scope of antitrust have not yet equated an action against public policy with a restraint of trade.

In considering his sales policies today, a manufacturer would certainly be foolish if he were to act under the assumption that the only threat to his refusal to deal lay in suits by the government. Private litigants have increasingly been successful in proving that the customers may enforce the law in this area. In fact, treble damage suits may present an even greater financial challenge to the seller than suit by the government.[35] Irrespective of *Tobman* and a number of earlier cases which interpose the "public injury" requirement between an illegal act and a private suit by a damaged party, he cannot rely on immunity on this theory in any instance in which the conduct would be found illegal in a suit by the government.

On the other hand, predictions to the contrary notwithstanding, a

34. *Id.* at 61.
35. The maximum penalty for Sherman Act violations if fifty thousand dollars. 26 STAT. 209 (1890), as amended, 15 U.S.C. § 1 (1958). Trebled damages in large scale transactions may amount to considerably more. *A single plaintiff* in Leow's Inc. v. Cinema Amusements, 210 F.2d 86 (10th Cir. 1954) proved damages of one hundred thousand dollars. The trebled amount was, of course, three hundred thousand dollars.

supplier has not been compelled to sell to all willing buyers to date. His right to choose customers on a basis rationally connected to a policy of requiring appropriate representation of his goods, and which does not amount to an illegal combination if contractually established with his dealers has also not been attacked. Thus, if a seller refuses to display the goods properly, uses the goods as a means of attracting customers to competitive items, etc., it would seem quite permissible to threaten cancellation of business dealings unless the situation were remedied. It appears equally unobjectionable for the manufacturer or supplier to cancel contractual relations with such dealer either after or without such warning.

Although the *Husserl* case and the dissenting opinion in *Poller* seem to suggest that the use of economic coercion can be equated with restraint of trade and then merely judged on the basis of reasonableness, this view seems unsupported by other decisions. Even if *Colgate*[36] had been overruled, actions which do not violate the substantive provisions of the antitrust laws would still seemingly be immune from suit. The lesser qualification of *Colgate* which has actually taken place still cannot be read as establishing a new antitrust law capable of supporting private suit.[37]

More difficult are the cases dealing with conditions imposed by refusal to deal where the conditions would be illegal if contractually arrived at. Two separate problems are presented. The first concerns those arrangements, such as price maintenance, from which the sellers benefit as well as the manufacturer. While a seller may wish to retain the benefits of being able to undersell his competitors, he has much to gain from a general moratorium on price competition. Indeed, in many cases, one might suspect that the demand for price fixing originated with the sellers. In such mutual benefit cases there is nothing illogical in allowing the trier of fact to imply a conspiracy in the acquiescence of the sellers to their supplier's demands. It is likely that each dealer was informed that the policy to which he was asked to adhere was also to be required from the other dealers. What in form might be abject adherence results in an effective method of horizontal agreement among the dealers. A similar analysis might be

36. *Supra* note 23.

37. The statutory provision allowing treble damage suits, § 4 of the Clayton Act, is expressly limited to damage caused by "reason of anything *forbidden in the antitrust laws*" (emphasis added) 38 STAT. 731 (1914), 15 U.S.C. § 15 (1958). Injunctive relief, granted by § 16 of the Clayton Act, is premised on "a violation of the antitrust laws," 38 STAT. 731 (1914), 15 U.S.C. § 26 (1958).

applied to some tying and exclusive dealing arrangements which result in a greater volume or range of sales by the manufacturer but also guarantee the dealer an exclusive sales territory or, at least, more limited competitition in the goods he sells.

If the court will imply a conspiracy to maintain the price of the product or to divide markets, there is little reason to prevent a suit by an excluded non-complying prior customer. The agreement among the dealers, which is hypothecated, surely contains not only the suggestion that all will comply but also that non-compliers will no longer be supplied. If this likely provision is also "implied" or actually found, the case is even more clearly supportable on the theory of price fixing or market sharing but now the additional theory of the boycott would certainly seem to make itself available though the courts have not, as yet, adopted the latter rationale.

There remains the question, as yet unanswered, whether a conspiracy may be or will be implied in such circumstances. In *Gemex,* the court found the arrangement itself sufficient. In the *Black and Decker* case, on the other hand, the opinion suggested that more remained to be proven. At a minimum, one would think that the manufacturer could still prove that the scheme was purely unilaterally imposed without either active participation or willing acquiescence by his customers. Beyond that, since the conduct is, after all, illegal when it is the result of joint action, the manufacturer would be well advised that his position is most tenuous.

The second problem arises in those cases in which a conspiracy cannot reasonably be implied, as in a great number of tying cases. *Osborn* and *Englander* suggest that the acceptance of the condition itself by the dealer constitutes the duality required to bring the case within the scope of the appropriate portions of the antitrust law.

Finding duality in compliance with the demands of the manufacturer would, of course, simplify the price-maintenance cases greatly. It would effectively overrule the *Colgate* doctrine and make the implied conspiracy doctrine discussed earlier unnecessary. There is little indication, however, of transferrence of the rationale to the pricing cases. Perhaps the nature of the restraints imposed suggests the reasons for a stricter interpretation in the cases which concern demands by the manufacturer to take larger quantities of his goods. In the pricing cases, the manufacturer relinquishes his goods before his condition is met. His condition is imposed not on the transaction then occurring but on future transactions. If the dealer chooses to cut prices, he may still do so, albeit at the risk of losing future supplies. Furthermore, if dealers are inclined to bolt from the suggested prices, the manufacturer may be forced to establish a sufficiently complex enforcement scheme to move himself away from his immune position as a single trader. In the tying and exclusive dealing cases, however, once the orders are placed the manufacturer has achieved everything that he demanded: the dealer has bought the tied product or taken his requirements of supplies from him. Unfortunately, this line of analysis seems to require acceptance of the condition at least once in order to establish the illegal duality. A subsequent cancellation of dealings when the dealer fails to renew the offending arrangement seems, however, to be within the scope of the damages arising from the initial demand.[38]

The apparent trend toward incapacitating demands for illegal schemes made on refusal to deal with non-compliers should not be viewed with too great alarm. To be sure, the right to choose one's customers is an important segment of a free economy and should be left intact to the extent possible. For just that reason, even economic disparity between the parties should not prohibit the use of refusal to deal to gain economic advantage or to terminate dealings with customers who have become offensive for one reason or another. If an answer is to be supplied for cases such as *Poller* and *Husserl* it should come from an attempt to deal with the inherent inequities in the situation itself. In both cases, some legislation is currently applicable.[39] Whether the legislation is adequate should not be decided under the guise of antitrust action. Economic disparity may itself lead to antitrust violation when it rises to the monopolization level.[40] Short of that, the underlying rationale seems to favor competition as a regulator. A right to buy, as such, is elemental to a regulated economy but inimical to the prevailing system.

Allowing private litigants to bring suit against suppliers on much the same evidence which would justify a governmental claim does not change the substantive law of refusal to deal. A given scheme is

38. In Emich Motors Corp. v. General Motors Corp., 340 U.S. 558 (1951) the Supreme Court held that, having etsablished a conspiracy to force General Motors dealers to use GMAC, "it therefore was necessary for petitioners only to introduce . . . evidence of the impact of the conspiracy on them, such as cancellation of their franchises and the purpose of General Motors in cancelling them, and evidence of any resulting damages." *Id.* at 571.

39. The CBS power is limited by FCC regulation. In fact, acquisition of a UHF station was held up pending the adoption by the FCC of the 5-2 rule which allowed networks to acquire up to 2 UHF stations. In *Husserl,* the plaintiff was bringing suit based on a statute designed in part to overcome his economic inequality vis à vis his supplier: the Robinson-Patman Act, 49 STAT. 1526 (1936), 15 U.S.C. § 13 (1958).

40. Eastman Kodak v. Southern Photo Materials Co., 273 U.S. 359 (1927).

still either innocent or illegal. It does, however, suggest the likelihood of a much greater level of enforcement than would otherwise be possible. A customer who has had his dealings with his supplier terminated has little reason for not suing. The government in its enforcement program must, of necessity, choose among many potentially offending dealers since it lacks the resources to investigate and prosecute all firms against which complaints are lodged.

In the price maintenance cases, this will mean that most of the plans in current operation which do not fall within the framework of fair trade laws may be tested in court. Since price fixing is one of the *per se* offenses, [41] the plaintiff will merely have to prove the "implied conspiracy" and his own damages. If such comparative ease of proof means that it will no longer be feasible to use refusal to deal to set retail prices, there seems little reason to regret the results. In those states which feel that legitimate ends are served by retail price fixing, the fair trade laws allow a great measure of latitude.[42] In the other states, where either the legislature[43] or the courts[44] have found fair trading not to be in the public interest, the justification for pricing based on refusal to deal is slight.

In the cases where the supplier demands purchase of a line of goods or exclusive dealing, the results will not be as dramatic. Neither offense is illegal *per se*.[45] Thus, the dealer must prove not only the scheme, his sometime adherence (to establish the requisite duality) or a conspiracy, but also that the effect of the plan has the requisite adverse affect on commerce.[46] In considering the effect on commerce, the courts will be free to exonerate the suppliers whose programs are justifiable because of economic necessity.

A supplier will still be free to choose his customers with an eye to his own economic welfare. If the customer does not assist in the promotion of the product being sold, he may be left without further supplies. In his right to refuse to deal, the supplier maintains the power to command competition for his product among retailers and thereby to command proper facilities and services in the sale of his

41. United States v. Trenton Potteries Co., 273 U.S. 392 (1927).
42. The provisions of state acts are summarized at ¶ 3003-3008 TRADE REG. REP.
43. Only five states do not have legislative provisions concerning fair trade.
44. A number of state courts have declared fair trade laws unconstitutional. *E.g.*, Union Carbide and Carbon Corp. v. White, 275 S.W.2d 455 (Ark. 1955); a chart of state rulings concerning the constitutionality of fair trade laws is presented at ¶ 3003 TRADE REG. REP.
45. FTC v. Sinclair Refining, 261 U.S. 463 (1923) (tying); Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320 (1961) (exclusive dealing).
46. Englander Motors, Inc. v. Ford Motor Co., 267 F.2d 11 (6th Cir. 1959).

product. Use of refusal to deal for such purposes is in accord with the philosophy of a free economy. Absent an offensive condition on continued dealing, a supplier should feel safe in choosing his customers. The courts will not likely force him to change his policies either at the behest of the government or of a private suitor.